SUPREME COURT, U. S.
FILED
NOV 12 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-595

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AND BELL TELEPHONE COMPANY OF NEVADA, *Petitioners*

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, *Respondent*

CITIZENS UTILITIES COMPANY AND CITIZENS UTILITIES COMPANY OF CALIFORNIA, *Real Parties in Interest*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

FRANCIS R. KIRKHAM
JAMES MICHAEL
NOBLE K. GREGORY
ROBERT M. WESTBERG
MICHAEL H. SALINSKY
225 Bush Street, 19th Floor
San Francisco, California 94104
Attorneys for Petitioners

F. MARK GARLINGHOUSE
195 Broadway
New York, New York 10007

JAMES A. DE BOIS
140 New Montgomery Street
San Francisco, California 94105

PILLSBURY, MADISON & SUTRO
225 Bush Street, 19th Floor
San Francisco, California 94104
Of Counsel

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Table of Contents

		Pages
I.	Interstate telephone communication is pervasively regulated by the Federal Communications Commission which has jurisdiction over the instant dispute exclusive of, or at least primary to, the jurisdiction of the district court	3
II.	The irrelevant arguments in the Brief in Opposition do not refute the necessity of review by this Court	5
III.	The extraordinary nature of the decisions below and the inexcusable waste of judicial time that they will incur warrant review by this Court	7
Conclusion		8

Table of Authorities Cited

Cases	Pages
Balt. & Ohio R. R. v. Pitcairn Coal Co., 215 U.S. 481	4
California v. Fed. Power Comm'n, 369 U.S. 482	5
Carnation Co. v. Pacific Conference, 383 U.S. 213	4, 5
Carter v. American Telephone & Telegraph Company, 365 F.2d 486, certiorari denied 385 U.S. 1008	3
F. C. C. v. RCA Communications, Inc., 346 U.S. 86	2
Georgia v. Pennsylvania R. Co., 324 U.S. 439	5
Japan Line, Ltd. v. Sabre Shipping Corporation, 407 F.2d 173	7
Mitchell Coal Co. v. Penna. R. R. Co., 230 U.S. 247	4
Otter Tail Power Co. v. United States, 410 U.S. 366	5
Roche v. Evaporated Milk Assn., 319 U.S. 21	7
Silver v. New York Stock Exchange, 373 U.S. 341	5
Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426	4
Tri-City Telephone Company, 20 F.C.C.2d 674	3
U. S. v. Philadelphia Nat. Bank, 374 U.S. 321	4
U. S. Nav. Co. v. Cunard S. S. Co., 284 U.S. 474	4
United States v. R. C. A., 358 U.S. 334	2, 3
Will v. United States, 389 U.S. 90	7

Statutes	
United States Code, Title 28	
Section 1292(b)	7
United States Code, Title 47	
Sections 151, et seq.	3
Section 201	3, 6
Section 204	3, 6
Section 205	3, 6

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-595

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AND BELL TELEPHONE COMPANY OF NEVADA, *Petitioners*

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, *Respondent*

CITIZENS UTILITIES COMPANY AND CITIZENS UTILITIES COMPANY OF CALIFORNIA, *Real Parties in Interest*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

The Brief in Opposition filed by real parties in interest demonstrates why the decisions below should not be allowed to stand. Their statement of the case (Brief in Opposition, pp. 3-10), even though one-sided and incom-

plete,[1] shows that they seek to try, as an antitrust case, a dispute raising complicated rate making concepts applicable to the reasonableness of the terms and conditions of interconnection between regulated telephone utilities. Such a trial requires, at the very least, prior reference to the regulatory agencies vested with jurisdiction and the required rate making experience and expertise.

The very assertion in this case that the Bell System constitutes a monopoly and a horizontal conspiracy with respect to the telephone calls carried on its facilities only illustrates what Congress anticipated when it established a regulatory commission with jurisdiction to determine, after opportunity for hearing, the just and reasonable division of charges between interconnecting carriers. As this Court pointed out in *F. C. C. v. RCA Communications, Inc.* (1953) 346 U.S. 86, 91-92, 93, and reiterated in *United States v. R. C. A.* (1959) 358 U.S. 334, 348-350, Congress has recognized the inefficacy of competitive market forces to regulate the common carrier service of the interstate telephone industry. Competition plays no part in determining the proper division of revenues between adjoining carriers whose communications facilities must interconnect. Congress has vested the Federal Communications Commission with the means and the complete authority to determine the correctness of the claims of real parties in interest. And that jurisdiction is exclu-

[1]Typical is their statement that petitioners conceded fraud (Brief in Opposition, p. 10) without pointing out that this was only an arguendo contention that the Federal Communications Commission had exclusive, or at least primary, jurisdiction *even if* it be assumed that the settlement agreements were reached by fraud or anticompetitive conspiracy.

sive of, or at least primary to, any jurisdiction in the district court.

I. INTERSTATE TELEPHONE COMMUNICATION IS PERVASIVELY REGULATED BY THE FEDERAL COMMUNICATIONS COMMISSION WHICH HAS JURISDICTION OVER THE INSTANT DISPUTE EXCLUSIVE OF, OR AT LEAST PRIMARY TO, THE JURISDICTION OF THE DISTRICT COURT.

Nowhere do real parties in interest deny that telephone communications are pervasively regulated by statute. To do so would be to deny reality (47 U.S.C. §§ 151, et seq.; *United States v. R. C. A.* (1959) 358 U.S. 334, 348-350; *Carter v. American Telephone & Telegraph Company* (5 Cir. 1966) 365 F.2d 486, 494, certiorari denied (1967) 385 U.S. 1008; see also Petition for Certiorari, pp. 9-13). Moreover, real parties in interest concede, as they must, that the Federal Communications Commission has jurisdiction over the very dispute involved in the case at bar —the division of revenues from interchanged telephone calls (Brief in Opposition, pp. 17-18; 47 U.S.C. §§ 201, 204, 205).

The claims that "[s]ettlements between telephone companies are not 'pervasively regulated'" (Brief in Opposition, p. 15), and that the "F.C.C. does not 'pervasively regulate' the telephone business" (Brief in Opposition, p. 16) are based on the misleading assertion of real parties in interest that the Federal Communications Commission has not been called upon to settle disputes between connecting carriers (cf. *Tri-City Telephone Company* (1969) 20 F.C.C.2d 674). In any event, they totally disregard the fact that they have never requested the Com-

mission to exercise that jurisdiction. They also disregard the established rule that prior action by an administrative agency is irrelevant to the issue of exclusive or primary jurisdiction: what is crucial is the statutory power to regulate when the issue is brought to the Commission's attention.

Texas & Pac. Ry. v. Abilene Cotton Oil Co. (1907) 204 U.S. 426, 440;

Balt. & Ohio R. R. v. Pitcairn Coal Co. (1910) 215 U.S. 481, 493-494, 498;

Mitchell Coal Co. v. Penna. R. R. Co. (1913) 230 U.S. 247, 257, 266-267;

Carnation Co. v. Pacific Conference (1966) 383 U.S. 213, 220-221;

U. S. Nav. Co. v. Cunard S. S. Co. (1932) 284 U.S. 474, 486-487.

And real parties in interest's assertion that petitioners have the burden of bringing the dispute to the Commission (Brief in Opposition, p. 20) is not supported by *Carnation Co. v. Pacific Conference* (1966) 383 U.S. 213, or by any of the foregoing cases.

The reasonableness of the division of revenues between regulated telephone companies, whose facilities must interconnect, presents a case in which Congress plainly intended to substitute pervasive regulation for competition (Petition for Certiorari, pp. 19-20). Not one of the cases cited by real parties in interest refutes this. In *U. S. v. Philadelphia Nat. Bank* (1963) 374 U.S. 321 (Brief in Opposition, p. 25), the Court found that bank regulation was not pervasive (374 U.S. 351-354) and specifically pointed out that "bank regulation is in most re-

spects less complete than public utility regulation" (374 U.S. 352). Likewise, in *Silver v. New York Stock Exchange* (1963) 373 U.S. 341, 357-359; *California v. Fed. Power Comm'n* (1962) 369 U.S. 482, 485-486; and *Georgia v. Pennsylvania R. Co.* (1945) 324 U.S. 439, 456 (Brief in Opposition, p. 25), unlike the case at bar, there was no pervasive regulation and the agencies did not have regulatory authority over the issues in question. In *Carnation Co. v. Pacific Conference* (1966) 383 U.S. 213 (Brief in Opposition, p. 25), a stay was ordered because of the agency's regulatory authority.

Nor is *Otter Tail Power Co. v. United States* (1973) 410 U.S. 366 (Brief in Opposition, pp. 22-23) in any way inconsistent with exclusive or primary jurisdiction of the Federal Communications Commission in the case at bar (see, generally, Petition for Certiorari, pp. 18-20). The Court in *Otter Tail* found specifically "that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power" (410 U.S. 374). Moreover, the Court affirmed the decree of the lower court which provided that the wholesaling would be done under " 'terms and conditions which are filed with and subject to approval by the Federal Power Commission' " (410 U.S. 375).

II. THE IRRELEVANT ARGUMENTS IN THE BRIEF IN OPPOSITION DO NOT REFUTE THE NECESSITY OF REVIEW BY THIS COURT.

The opposition to the petition argues matters irrelevant to the issue. It finds a distinction, for example, between a tariff and a contract (Brief in Opposition, pp. 20-21),

but completely ignores the basic fact that plenary power is in the Federal Communications Commission to establish the terms and conditions of both tariffs and contracts. Both parties to the interconnection agreements are fully regulated communications carriers. Therefore, it is not the manner of filing the disputed document which confers jurisdiction but the substance of the dispute, i.e., the division of revenues from interchanged telephone calls. The Federal Communications Commission is given regulatory authority over such divisions (47 U.S.C. §§ 201, 204, 205) and whether the divisions which are the subject of the dispute were originally in the form of a contract or tariff is irrelevant.

Likewise irrelevant is the statement regarding the "splitting" of the claims between the Federal Communications Commission and the California Public Utilities Commission (Brief in Opposition, pp. 19-20). The issue in this case is whether those Commissions have exclusive or primary jurisdiction. There is simply no question that the dispute is within the jurisdiction of the Federal Communications Commission. That agency is the primary concern of the Federal courts.

The assertion that the record in the instant case is inappropriate for review (Brief in Opposition, p. 11) is also irrelevant. Administrative jurisdiction is a matter of statutory construction. Accumulation by the court of detailed evidence prior to the determination of proper jurisdiction would be a gross waste of judicial time. Nor is there any basis for the implication that petitioners are seeking a final review of the case on the merits without real parties in interest having their evidence con-

sidered (Brief in Opposition, p. 11). It is to regulatory agencies that real parties in interest should present their evidence.

III. THE EXTRAORDINARY NATURE OF THE DECISIONS BELOW AND THE INEXCUSABLE WASTE OF JUDICIAL TIME THAT THEY WILL INCUR WARRANT REVIEW BY THIS COURT.

The assertion that this case presents no extraordinary question requiring review by this Court (Brief in Opposition, p. 12) is unsupported by any authority. *Will v. United States* (1967) 389 U.S. 90, 95, relied on *Roche v. Evaporated Milk Assn.* (1943) 319 U.S. 21, 26, in pointing out that the writ of mandamus is available to confine an inferior court to the lawful exercise of its prescribed jurisdiction. The court noted that:

> "While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power,' will justify the invocation of this extraordinary remedy" (389 U.S. 95).

In *Japan Line, Ltd. v. Sabre Shipping Corporation* (2 Cir. 1969) 407 F.2d 173 (Brief in Opposition, p. 12) the court of appeals clearly understood that mandamus was a proper remedy when the district court refused to defer to the jurisdiction of an administrative agency.[2] In that

[2]The court in that case also held "that 28 U.S.C., Section 1292(b) does not supplant the All Writs Act. * * * the mere denial by a District Judge of an application for certification under 28 U.S.C., Section 1292(b) does not preclude our consideration of a petition for any of the traditional writs" (407 F.2d 175).

case, the writ was denied because the plaintiff had gone to the administrative agency and that agency had refused to exercise its jurisdiction (407 F.2d 175).

In the case at bar, we submit, there has clearly been an unlawful failure to recognize the jurisdiction of the Federal Communications Commission. We further submit that in the circumstances of this case, the appropriate administration of justice requires the exercise of this Court's corrective powers at this time (see Petition for Certiorari, pp. 25-27).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS R. KIRKHAM
JAMES MICHAEL
NOBLE K. GREGORY
ROBERT M. WESTBERG
MICHAEL H. SALINSKY
Attorneys for Petitioners

F. MARK GARLINGHOUSE
JAMES A. DE BOIS
PILLSBURY, MADISON & SUTRO
Of Counsel